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No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL YOASH AND MARK CASSON,

Petitioners,

v.

McLEAN CONTRACTING COMPANY, INCORPORATED

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a worker aboard a special-purpose vessel in navigation (e.g., dredges, barges, and other such vessels) whose duties and employment relate to the function of said vessel and not primarily to the transportation function of the vessel presents a jury question as to seaman status under the Jones Act.

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is cited as Yoash v. McLean Contracting Co., Inc., 907 F.2d 1481 (4th Cir. 1990). The prior opinions of the United States District Court for the District of Maryland are unreported and are included in the appendix starting at A-23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on July 13, 1990. Jurisdiction to review this judgment by writ of certiorari is conferred on the Supreme Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is 46 U.S.C. § 688(a), commonly known as the Jones Act:

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

Paul Yoash and Mark Casson were employed by McLean Contracting Company and were injured in separate accidents in the course of their employment while they were working on board a floating crane barge in navigation known as the CAPE FEAR.

Suit was filed in federal court under the Jones Act and the maritime doctrine of unseaworthiness against their employer. Summary judgment was subsequently entered in favor of the employer. The cases were appealed to the Fourth Circuit, which consolidated their cases. The appellate court determined that the workers' duties were not to "serve naturally and primarily as an aid to navigation" in that their activities did not relate to the transportation function of the vessel and any activities relating to the transportation function were incidental to the pile driving work. It was held that neither was entitled to coverage under the Jones Act.

REASONS FOR GRANTING WRIT

The issue of Jones Act coverage for workers on special purpose vessels (such as dredges, barges, and other similar vessels) goes beyond the litigants of this case and directly affects thousands of workers in all geographic areas of the United States. The Supreme Court has not ruled upon this subject since 1958 and should, therefore grant certiorari to resolve conflicting standards that have developed among the lower courts for determining coverage under the Jones Act.

By its terms, the Jones Act authorizes any "seaman" who is injured in the course of employment to maintain an action at law for damages against his employer. The Jones Act, however, does not define the term "seaman," and it is has been left to the federal courts to develop the scope of this term. Through judicial interpretation, the term "seaman" has become equivalent in meaning to the phrase "member of the crew of a vessel." Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946).

The federal courts have taken two divergent approaches in determining coverage under the Jones Act for workers connected with the operation of special purpose vessels.[1] Specifically, the lower courts differ as to what, if any, emphasis is to be placed on a worker's activities to the transportation function of the vessel. The Seventh and Third Circuits require a worker to have performed significant duties relating to the transportation function of the vessel. Johnson v. John F. Beasley Construction Company, 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985); Simko v. C & C Marine Maintenance Co., 594 F. 2d 960 (3d Cir.), cert. denied, 444 U.S. 833 (1979); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

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[1] For an extensive discussion of cases applying the two different approaches see Annotation, Applicability of Jones Act to Workers Connected with Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment, 92 ALR Fed. 733.

The First, Second, Fourth (until 1988 discussed infra), Fifth, Sixth, and Eighth Circuits, on the other hand, interpret the aid to navigation requirement as satisfied if an employee's duties relate to the special purpose function of the vessel, and not just exclusively the transportation function. See e.g., Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975), Stafford v. Perini Corp., 475 F.2d 507 (1st Cir. 1973); Harney v. Moore Building Corp., 359 F.2d 649 (2d Cir. 1966); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), Offshore Co. v. Robison, 266 F.2d 769 (5th Cir 1959); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975). The appellate court in Stafford, for example, stated that since on of the primary functions of the barge was to provide a work area for the construction of concrete forms, it was clear that the worker's duties

directly related to the performance of the barge's mission.

The Court of Appeals for the Fourth Circuit in Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976), established a three-prong test for determining seaman status under the Jones Act: (1) the worker must be more or less permanently attached to a vessel or fleet; (2) his duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel is in navigation. In Whittington, the court included the language "in the broadest sense" in the second prong of the test. In Lawrence v. Norfolk Dredging Company, 319 F.2d 805 (4th Cir. 1963) the Fourth Circuit stated that "navigation in the broadest sense" is not confined strictly to the actual navigating or movement of the vessel but embraces duties essential for other purposes of the vessel. Id. at 366. Thus, the approach in the Fourth Circuit had been that the worker need not be involved in the transportation function of

the vessel. The Fourth Circuit, however, eventually departed from this language in Stephenson v. McLean Contracting Company, 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989) and in the instant case by holding that the consideration in the Fourth Circuit is whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel. Summary judgments in both Stephenson and in this case were entered by Judge Motz of the U.S. District Court for Maryland.

Although the Supreme Court has never enunciated a precise test in determining the status issue for coverage under the Jones Act, this Court has indicated that a worker's status must be defined in reference to the vessel upon which he is working and that navigation embraces duties other than the vessel's transportation function. In Norton v. Warner Co., 321 U.S. 565 (1944), this Court stated that members of the crew are not confined to those who can "hand, reef and steer." Id. at

572. In Gianfala v. Texas Company, 350 U.S. 879 (1955), the employee was a member of a drilling crew and was killed while unloading drilling pipe onto the barge. At trial, the issue of the employee's status was submitted to the jury, which found in favor of the employee. The Fifth Circuit Court of Appeals reversed, holding that as a matter of law the employee was not aboard primarily to aid in navigation. The Supreme Court, without discussion, reversed and remanded the case to the trial court with instructions to reinstate the jury verdict in favor of the employee. Similarly, in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958) this Court determined that a worker assisting in the erection of a radar station may be a seaman for purposes of the Jones Act. Lastly, this Court in Butler v. Whiteman, 356 U.S. 271 (1958) held that an employee doing odd jobs around his employer's wharf may be a seaman for purposes of the Jones Act.

The standard developed by the Fourth Circuit is not consistent with the Supreme Court decisions previously discussed. These Supreme Court cases indicate that coverage is extended to those who work to further the purpose or function of the vessel. The circuit courts that emphasize the transportation function of the vessel have focused on the Supreme Court's statement that seaman are those aboard "primarily to aid in navigation." See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). This approach, however, disregards the later holdings of this Court.

In keeping with the remedial purpose of the Jones Act, the Act has been and should be construed broadly. The test announced by the Fourth Circuit and those circuits adopting a similar approach requiring a worker to be involved with the "transportation function" is not consistent with opinions from this Court and other federal circuits. Certiorari should therefore be granted to provided useful guidance to the lower courts and to

promote uniform application of the Jones Act throughout the United States.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests that a Writ of Certiorari be granted.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2449

PAUL J. YOASH,

Plaintiff - Appellant,

versus

MCLEAN CONTRACTING COMPANY, INC.,

Defendant - Appellee.

No. 89-2450

MARK CASSON,

Plaintiff - Appellant,

versus

MCLEAN CONTRACTING COMPANY, INC.

Defendant - Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA Nos. 88-2797, CA-88-1244-JFM).

Argued: April 4, 1990 Decided: July 13, 1990

Before ERVIN, Chief Judge, SPROUSE, Circuit Judge, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Smith wrote the opinion, in which Chief Judge Ervin and Judge Sprouse joined.

ARGUED: Randolph C. Baker, LENTZ, HOOPER, JACOBS & BLEVINS, P.A., Baltimore, Maryland, for Appellants. Thomas G. Young, III, Baltimore, Maryland, for Appellee. **ON BRIEF:** Joseph F. Lentz, Jr., LENTZ, HOOPER, JACOBS & BLEVINS, P.A., Baltimore Maryland, for Appellants. Andrew Martin Battista, Baltimore, Maryland, for Appellee.

SMITH, District Judge:

Paul J. Yoash ("Yoash") and Mark Casson ("Casson") brought separate suits in the district court of Maryland asserting claims under the Jones Act, 46 U.S.C. § 688

(a), and under the maritime doctrine of unseaworthiness against their former employer, McLean Contracting Company ("McLean"). The district court granted summary judgment in favor of McLean in both cases because neither Yoash nor Casson qualified as a seaman under the test for seaman status applicable in this circuit. In this consolidated appeal, Yoash and Casson urge this court to adopt a broader definition of seaman status under the Jones Act. For the reasons stated below, we affirm the decisions of the district court.

I.

At the time of their respective injuries, Yoash and Casson were working as members of the pile driving crew on board the floating crane barge, CAPE FEAR. McLean was performing tests and engaged in pile driving for the construction of bridge piers for a new bridge over the Choptank River on the Eastern Shore of Maryland. Yoash began working for McLean as a pile driver on April 3, 1985. His employment history shows

that he was engaged in construction work on bridges and industrial piers from 1972 until his injury on October 15, 1985. Yoash was first employed as a pile driver in 1976.

On board the CAPE FEAR, one of Yoash's jobs was to run the power pack which operates the ICE Machine. An ICE machine is a vibrating hammer used to drive or extract pile or steel beams. Yoash performed a variety of other tasks on board the CAPE FEAR, which tasks included: cleaning out concrete pilings; escorting state inspectors who were there to insure that pilings were not cracked; manning the desk winches when the crane barge was being moved a short distance to drive another piling; making repairs to the deck winches and to the jet pumps used in the dredging operation for setting pilings; and marking off pilings for cutting. Yoash never did any cleaning or painting on the barge and he also never slept overnight on the barge. He was never certified by the United States Coast Guard for maritime work.

Since the CAPE FEAR has no motive power of its own, except for the deck engines which operate the anchor lines, it is pushed into place by a tugboat and then it is anchored. Because it can move the distance of its anchor lines, the CAPE FEAR is equipped with long steel beams, known as spuds, which are dropped to the river bottom to hold the barge in place during pile driving. Each spud has a cable that is long enough to reach the deck so that someone standing on the deck can raise and lower the spud. The spud cable is normally placed above the anchor line to avoid tugging the anchor line when the spud cable is pulled. In this case, the spud cable was improperly placed underneath the anchor line. As Yoash was stepping over the anchor line, which is no higher than eighteen (18) inches off the deck, the spud line was pulled, causing the anchor line to jerk up underneath Yoash, who tripped and injured his leg. At the time of his injuries, Yoash was installing falsework pilings.

Casson began working for McLean on March 4, 1985. His work experience with respect to building docks and piers began 1984, when he learned pile driving and worked off a crane barge. Shortly before his employment with McLean, Casson was employed as a carpenter doing building interior finishes, and he did some sheet metal work on the sides of prefabricated steel buildings which were set up on the Eastern Shore. During the course of his employment with McLean, Casson performed a variety of duties. Prior to his first injury on July 20, 1985, Casson was employed on a workboat which was used to push vessels to their destination. He was injured when he jumped from a barge being pushed by a workboat onto the deck of the CAPE FEAR. After recuperating from his injury, Casson was assigned to the CAPE FEAR where he was employed as a pile driver. Casson asserts that his duties included more than just pile driving. McLean concedes that approximately two to three times per week Casson

would work on a workboat. On the CAPE FEAR, Casson maintained the jet (dredge) pumps used in pile driving and he alleges that he performed general maintenance duties on the vessel.

Casson was laid off from December 20, 1985, until February 24, 1986. Upon his return, Casson's duties were about the same as they had been before he was laid off, with the exception that he spent all of his time on the CAPE FEAR or the vessels alongside of the barge. Casson did not sleep overnight on the barge. Casson was injured on March 25, 1986, while performing pile driving work. He knelt down on a template to mark a grade, and as he knelt down, his knee popped.

In granting summary judgment for McLean, the district court relied solely on the case of Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, _____ U.S. ____ , 109 S. Ct. 2110 (1989). It concluded that neither Yoash nor Casson had distinguished his case from Stephenson, and therefore

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the court was bound by that decision. This appeal by Yoash and Casson followed.

II.

Summary judgment is appropriate when there is no genuine issue of any material fact and it appears that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). The material facts of a controversy are those identified by controlling substantive law as essential elements of claims and defenses. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A moving party is entitled to summary judgment if the non-moving party has failed to make a sufficient showing on an essential element of the case with respect to which the non-moving party has the burden of proof. Celotex, 477 U.S. at 322-23. In evaluating a case, a court must view the facts and inferences reasonably to be drawn therefrom in the light most favorable to the non-moving party. Ross v. Communications Satellite Corp., 759 F.2d

355, 364 (4th Cir. 1985)(citations omitted). Questions of law are reviewed de novo on appeal. Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166-67 (4th Cir. 1988).

III.

The Jones Act, 46 U.S.C. § 688, provides in pertinent part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . ." (Emphasis added.) Only a worker who qualifies as a "seaman" may avail himself of the benefits provided by the Act. Because the Jones Act does not define the term "seaman" or provide criteria for eligibility, federal courts have developed definitions on a case by case basis. Through judicial interpretation, the term "seaman" has become equivalent in meaning to the phrase "member of the crew of a vessel plying in navigable waters." Swanson v. Marra Brothers, Inc., 328 U.S. 1, 7 (1946). The Supreme Court in South Chicago Coal &

Dock Co. v. Bassett, 309 U.S. 251, 260 (1940) (citations omitted), recognized that the word "crew" meant "employees on the vessel who are naturally and primarily on board to aid in her navigation." This court in Whittington v. Sewer Constr. Co., 541 F. 2d 427, 436 (4th Cir. 1976), established a three-prong test for determining seaman status under the Jones Act: (1) the worker must be more or less permanently attached to a vessel or fleet; (2) he must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel must be in navigation. Id. at 436.[2]

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[2]. In setting forth this three-prong test in Whittington, this court specifically noted that Congress, by enacting the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901 et seq.), intended to limit Jones Act benefits to those persons who are members of a crew or vessel plying in navigable waters. 541 F.2d at 436 (quoting Swanson v. Marra Brothers, Inc., 328 U.S. 1, 7 (1946)).

In Whittington, the plaintiff alleged that he performed the work of a deckhand and a seaman and that he was a member of the crew aboard a barge used in a bridge demolition project. The barge was moored in the river beneath a hole cut in the bridge. As the bridge was dismantled, the scrap was lowered onto the barge through the hole. The plaintiff sustained injuries when he fell from the bridge onto the barge, as he was being lowered through the hole by a cable. Applying the three criteria set forth above, this court concluded that Whittington did not qualify as a seaman, thereby affirming the dismissal of plaintiff's case for lack of admiralty jurisdiction. 541 F.2d at 436-37. [3]

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[3]. In Whittington, all three alternative criteria for establishing admiralty jurisdiction were examined, namely (1) whether the "injuries occurred upon navigable waters and had a maritime nexus," or (2) whether "the injuries were caused by a vessel in navigable waters or an appurtenance of the vessel," or (3) whether "the person injured was a seaman ... injured in the course of his

In Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, ____ U.S.____ , 109 S. Ct. 2110 (1989), this court had another opportunity to address the issue of seaman status under the Jones Act. In Stephenson, the plaintiff was an employee of McLean and was regularly assigned to work on the ANNAPOLIS, a crane barge which was being used as a work platform to construct the columns of a bridge. Stephenson was working in a cofferdam, when he slipped and fell to the bottom of it. The district court found that "the nature

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employment." 541 F.2d at 432 (citations omitted). The three-prong test for Jones Act seaman status was set forth by the court in Whittington when it examined the third criteria for admiralty jurisdiction, together with an examination of the distinction between the remedies available under the Jones Act and the warranty of seaworthingness. Id. at 433-36; see infra at 14-15. As recognized in Whittington, the class of persons traditionally defined as "seaman" for admiralty jurisdictional purposes are the same as those afforded a remedy under the Jones Act, 541 F.2d at 435; whereas those afforded a remedy under the warranty of seaworthiness need only to be performing the traditional work of a seaman, after having first established a basis for admiralty jurisdiction. Id. at 433; see infra at 14-15.

and purpose of [Stephenson's] activities were to construct a bridge." 863 F.2d at 341. The district court then applied the Whittington test and concluded that Stephenson's duties did not serve naturally and primarily as an aid to navigation because they did not contribute directly or indirectly to the "transportation function" of the vessel. Id. [4] Consequently, the district court granted summary judgment in favor of McLean on the Jones Act claim. This court, agreeing that the second prong of the Whittington test had not been satisfied and that there were no genuine issues of material fact to go to the jury, affirmed the judgment of the district court. Id.

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[4]. Specifically, the district court held that Stephenson's "duties, considered in the aggregate, did not primarily serve as an aid to navigation and that he was not primarily engaged in moving the ANNAPOLIS or otherwise contributing to the transportation function of the vessel." 863 F.2d at 341 (emphasis added). The district court further found that Stephenson was not even "indirectly contributing to the vessel's navigational functions by providing support services to those who were performing them." Id.

In Stephenson, the only matter at issue under the Jones Act was whether Stephenson's duties served naturally and primarily as an aid to navigation, the second prong of the Whittington test. Stephenson, 863 F.2d at 341. The district court in the cases at bar did not specify any basis for its decisions other than it felt bound by Stephenson. Therefore, it is inferred that the district court found that neither Yoash nor Casson could satisfy the second prong of the Whittington test, even viewing the facts in a light most favorable to each of them. Accordingly, we only address this issue on appellants' Jones Act claims.

On appeal, Yoash and Casson advance two arguments for reversing the district court's decisions. First, they assert that this court in Stephenson improperly injected a "transportation function" element into the second prong of the Whittington test, and, therefore, Stephenson should be re-examined. Second, they argue that their cases, in any event, are factually distinguishable

from Stephenson. We do not agree with either of these contentions.

IV.

The second prong of the Whittington test does require that a worker's duties serve naturally and primarily as an aid to navigation in order for a worker to be considered a seaman. Whittington, 541 F.2d at 436. The courts of appeals differ with respect to the emphasis and weight given to this prong of the test for seaman status. The Seventh and Third Circuits require a worker to have performed significant navigational functions in order to be considered a seaman. The Court of Appeals for the Seventh Circuit has stated:

> Because a Jones Act "seaman" is one who is a member of a crew of a vessel, and because a "vessel" under the Jones Act, while interpreting liberally, has been consistently defined as a floating structure that must have as one of its functions the transportation of personnel or materials across navigable waters, we believe it is the employee's relation to the transportation function of the vessel, i.e., whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport

> on water, that is critical for Jones Act purposes. Such an interpretation fulfills what we believe to be the central purpose of the Act: to provide protection for those subjected to risks associated with the transportation function of vessels on navigable waters.

Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054, 1061-62 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985) (citations omitted) (emphasis in original). This view is consistent with the approach taken by the Third Circuit. See Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976); Simko v. C & C Marine Maintenance Co., 594 F.2d 960 (3rd Cir.), cert. denied, 444 U.S. 833 (1979). In contrast, the Fifth Circuit in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), and in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), has taken the position that the aid to navigation requirement must be interpreted quite broadly in light of the Supreme Court's early Jones Act decisions. It interprets the aid to navigation element as being satisfied if an employee

participates in any function a vessel may be designed to serve, not just exclusively the transportation function. Barrett, 781 F.2d at 1073.

A review of the foregoing authorities and this court's decisions in Whittington and Stephenson lead to the conclusion that Stephenson did not improperly narrow the second prong of the Whittington test by injecting a "transportation function" into the inquiry. In Whittington, the court did include the language "in the broadest sense" with the "aid to navigation" consideration, citing a 1966 Second Circuit case, Harney v. William M. Moore Building Corp., 359 F. 2d 649, 654 (2nd Cir. 1966).[5] No specific interpretation or refinement

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[5]. However, the court in Harney specifically stated: "But we need not decide whether tasks performed aboard ship in furtherance of the vessel's special mission [i.e., bridge building, dredging, operation, etc.], but not of the vessel itself, are evidence of the crewman status." 359 F.2d at 655-56. Rather, the court determined that Harney had numerous nautical tasks apart from the vessel's special mission to thereby permit an inference of seaman status to merit a jury's consideration. Id. at 656.

of this language was offered in Whittington. The court in Stephenson then refined and focused the second prong of the test to include consideration of a direct or indirect relation to the transportation function of the vessel in determining whether the worker's duties primarily served as an aid to navigation. The second prong of the test for determining seaman status under the Jones Act, after Whittington and Stephenson, is whether a worker's duties, when considered in the aggregate, serve naturally and primarily as an aid to navigation. In making the "aid to navigation" determination, a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate. We also disagree with appellants' second contention that their cases are factually distinguishable from Stephenson. First, appellants point to the fact that Stephenson was not injured on a vessel or on a appurtenance to a vessel, but instead was injured in a cofferdam. In the instance

cases, however, Yoash was injured on the deck of the CAPE FEAR, and Casson was injured on a template beam which may constitute an appurtenance to the vessel. [6] Nevertheless, the situs of a worker's injuries has no determinative value for purposes of evaluating seaman status under the Jones Act. See O'Donnell v. Great Lakes Co., 318 U.S. 36, 39, 42-43 (1943).[7]

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[6]. McLean argues in its brief that the template beam is not an appurtenance of the CAPE FEAR. Brief of Appellee at 25. Since the situs of appellants' injuries is not pertinent to seaman status under the Jones Act, determination of this point is not necessary.

[7]. Moreover, in Whittington, the plaintiff was injured when he fell onto a barge. 541 F.2d at 430. In Johnson, plaintiff was injured on a floating barge. 742 F.2d at 1056, And, in Barrett, the plaintiff was injured while transferring from a crewboat to a barge and then suffered a second injury the next day while working on the barge. 781 F.2d at 1069. In each case, the respective plaintiffs were found not to be Jones Act seamen. The court in Barrett focused on plaintiff's length of service on the vessel to determine whether he performed a substantial amount of his work aboard it. Id. at 1074-76. In Whittington and Johnson, the courts directed their attention to the plaintiffs' duties considered in the aggregate. Whittington, 541 F.2d at 434-46; Johnson, 742 F.2d at 1064.

Next appellants claim that their duties, when considered as a whole, establish that they served as an aid to navigation in the broadest sense. They do not contend that their duties primarily contributed to the transportation function of the vessel. It is clear that Yoash and Casson were pile drivers whose primary purpose was to aid in the building of a bridge, not in the navigation of the vessel.[8] Their duties, when considered in the aggregate, were not to "serve naturally and primarily as an aid to navigation." Stephenson, 863 F.2d at 341; Whittington, 541 F.2d at 436. Those activities which did relate to the transportation function of the CAPE FEAR were offshoots of the pile driving work. There was no genuine issue of material fact to be determined on these points. Therefore, the district

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[8]. Of particular interest in the grievance Casson filed after his second injury on March 25, 1986, on the ground that he was not being paid as a pile driver. A pile driver's hourly wage was considerably higher than what Casson was earning. Casson won this wage claim. Joint App. at 348, 419.

court correctly granted summary judgment for McLean on the Jones Act claims because neither Yoash nor Casson qualified as a seaman under the second prong of the Whittington test as refined in Stephenson.

V.

The warranty of seaworthiness imposes a nondelegable duty on a vessel owner or operator to insure that the vessel is fit for voyage. See Mahnich v. Southern S.S. Co., 321 U.S. 96, 99 (1944) ("the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel ... has been the settled law since this Court's ruling to that effect in The Osceola," 189 U.S. 158, 175 (1903)). A cause of action for unseaworthiness is separate and distinct from a Jones Act claim. Gosnell v. Sea-Land Service, Inc., 782 F.2d 464, 467 (4th Cir. 1986) (citing Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 reh'g denied, 401 U.S. 1015 (1971)). A claim for unseaworthiness requires a maritime worker to show

that he was doing the traditional work of a seaman at the time he was injured. Stephenson, 863 F.2d at 341-42; Whittington, 541 F.2d at 434. Neither Yoash nor Casson was performing the job of a seaman at the time of the injuries in question. They were both injured while performing their jobs as pile drivers; Yoash was installing falsework pilings when he was injured, and Casson was on a template making a grade for the piles. They have no viable claims under the warranty of seaworthiness.

VI.

Based on the foregoing reasons, we conclude that the district court did not err in granting McLean's motion for summary judgment on Yoash's and Casson's claims under both the Jones Act and the warranty of seaworthiness. Accordingly, the decision below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK CASSON *

v. * Civil No. JFM-88-1244

MCLEAN CONTRACTING COMPANY

*****

MEMORANDUM

In this action plaintiff asserts claims under the Jones Act and for unseaworthiness. At the time he was injured plaintiff was working as a pile driver off of the crane barge CAPE FEAR at the Choptank River Bridge project. Defendant has moved for summary judgment.

Plaintiff has made no effort to distinguish this case from Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989). To the contrary, he argues that Stephenson was "incorrectly decided." This Court is of the view that Stephenson was correctly decided, and, in any event, it is bound by that decision. Accordingly, defendant's

motion for summary judgment will be granted. A separate order to that effect is being entered herewith.

Date: July 14, 1989

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK CASSON *

v. * Civil No. JFM-88-1244

MCLEAN CONTRACTING COMPANY

*****

ORDER

For the reasons stated in the memorandum entered herein, it is this 14th day of July, 1989

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgement is entered in favor of defendant against plaintiff.

J. FREDERICK MOTZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH *

v. * Civil No. JFM-88-2797

MCLEAN CONTRACTING COMPANY *

*****

MEMORANDUM

In this action plaintiff asserts claims under the Jones Act and for unseaworthiness. At the time he was injured plaintiff was working as a pile driver off of the crane barge CAPE FEAR at the Choptank River Bridge project. Defendant has moved for summary judgment.

Plaintiff has made no effort to distinguish this case from Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989). To the contrary, he argues that Stephenson was "incorrectly decided." This Court is of the view that Stephenson was correctly decided, and, in any event, it is bound by that decision. Accordingly, defendant's

motion for summary judgment will be granted. A separate order to that effect is being entered herewith.

Date: July 14, 1989

J. Frederick Motz
United states District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH *

v. * Civil No. JFM-88-2797

MCLEAN CONTRACTING COMPANY

*****

ORDER

For the reasons stated in the memorandum entered herein, it is this 14th day of July, 1989

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgment is entered in favor of defendant against plaintiff.

J. Frederick Motz
United States District Judge

(2)

No. 90-602

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL YOASH AND MARK CASSON,

Petitioners,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court ought to grant certiorari in a case in which the conflict among the Circuits over the proper test to be applied in determining seaman status under the Jones Act would not affect the outcome of this litigation and would be the same under any of the tests, and which would entangle the Court in factual issues.

LIST OF AFFILIATED CORPORATIONS

The Respondent is affiliated with no other corporations, except wholly-owned subsidiaries.

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No. 90-602

In The
Supreme Court of the United States

OCTOBER TERM, 1990

PAUL YOASH AND MARK CASSON,

Petitioners,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Jones Act cases require minute inquiry into the particular facts of each case. In addition, the Circuit Courts have developed tests for Jones Act seaman status which are responsive to local conditions. Lastly, an examination of the facts of this case under the tests developed in the various Circuits, demonstrate that the outcome of this case would, in all likelihood, be the same under any of the tests of seaman status.

Therefore, the Court ought to decline to grant the Petition for long-standing policy considerations.

ARGUMENT

A. INTRODUCTION

The sole question presented by Petitioner as being of sufficient importance for the granting of a writ of certiorari by this Court in this case has to do with the proper test to be applied in assessing the nature of the job duties of a claimant in determining whether the applicable portion of the Jones Act test for seaman status has been met. It is by now universally recognized that there is, indeed, a conflict among the Courts of Appeal on this issue.

Therefore, Petitioners appear to invoke the Court's guideline contained in Supreme Court Rule 10.1(a) which states that the Court may exercise its discretion

to grant a writ:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter ....

The discussion which follows will set forth Respondent's reasons for arguing that the Petition ought not to be granted.

B. JONES ACT CASES HAVE ENTANGLED THE COURT IN FACTUAL ISSUES.

Justice White, in dissenting from denials of certiorari in Jones Act cases, has discerned that the Fifth Circuit has lead in adopting one approach, and that the Seventh and Third Circuits have adopted another. Lormand v. Aries Marine Corp., 484 U.S. 1031 (1988 - dissenting opinion joined in by Justice Blackmun);

International Oilfield Divers, Inc. v. Pickle, 479 U.S. 1059 (1987 - dissenting opinion joined in by The Chief Justice). In the case companion in all respects to this case, Stephenson v. McLean Contracting Co., Inc., 863 F.2d 340 (4th Cir. 1988), cert. denied 109 S.Ct. 2110 (1989), Justice White would have granted certiorari, although no reasons were given.

Clearly there is sentiment among certain of the Justices that, in a proper case, this Court should review the Jones Act tests for seaman status adopted by the courts of appeal, and formulate a test applicable in all cases, if that is possible.

One problem with Jones Act cases, however, is their intensely factual orientation.

> The many cases turning upon the question of whether an individual was a "seaman"

> demonstrate that the matter depends largely on the facts of the particular case ....

Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190 (1952).

One need only reflect upon the disagreements among the Justices in previous cases, as expressed in the majority and dissenting opinions, to note that the resolution of Jones Act cases involves careful scrutiny of the facts peculiar to each claim of seaman status. See, eg., Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959); Butler v. Whiteman, 356 U.S. 271 (1958); Grimes v. Raymond Concrete Pile Company, 356 U.S. 252 (1958). Even where the Justices are in agreement, cases such as South Chicago Coal and Dock Co. v. Bassett, 309 U.S. 251 (1940), demonstrate beyond argument

the entanglement of appellate courts, including this Court, in minute inquiry into the facts determining seaman status peculiar to a particular case.

This is to suggest, therefore, that such cases may bring this Court perilously close to a violation of its own policy of avoiding decisions which benefit only a particular litigant. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). Stated differently, this Court may find itself in the business of reviewing Jones Act cases solely for the purpose of deciding whether the evidence or inferences drawn from it justified the action taken below, which is ordinarily not a reason for granting a writ of certiorari. See, General Talking Pictures Corporation v. Western Electric Co., 304 U.S. 175, 178 (1938); McAllister v. United States, 348 U.S. 19, 23-5

(1954 - dissent by Justice Frankfurter).

C. THE ISSUES NEED FURTHER DEVELOPMENT BY THE COURTS OF APPEAL.

In addition to the previous argument, there is another also based on the discretionary aspect of certiorari. It is doubtful that this Court can create a rule or test that will be equally satisfactory in each case, or which will be equally responsive to the differing circumstances prevailing among the Circuits. For example, it is common knowledge that the Fifth Circuit formulated its own expansive test of seaman status in order to provide a much-needed remedy to classes of offshore drilling platform workers who were, at the time, without recourse under any state or federal compensation scheme. See

concurring opinion of Judge Gee in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1076 (5th Cir. 1986).

However, in Circuits where such considerations do not pertain, a different test has evolved which is more in keeping with a particular Circuit's own view of the remedy which ought to be provided. See, eg., Johnson v. John F. Beasley Construction Company, 742 F.2d 1054, 1060-62 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985). In fact, when the circumstances peculiar to the Fifth Circuit were altered by the passage of remedial legislation, certain members of that court urged the reversal of previous authority and the adoption of the Seventh Circuit test. Barrett v. Chevron, U.S.A., Inc., supra, 781 F.2d at 1073, 1076; See, International Oilfield Divers, Inc. v. Pickle, supra.

The various Circuits have responded to local need in developing their respective tests and it may well be that as time progress and local conditions ameliorate, the courts of appeal will develop a test that all can agree upon. As stated by Justice Frankfurter in his opinion denying the granting of a writ in State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950):

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

D. THIS CASE DOES NOT PROPERLY FRAME THE ISSUES.

Justice White, as noted earlier, has observed two main lines of approach in stating the Jones Act test:

> The Fifth Circuit ... has taken the position that to be a seaman, a person need not assist in the transportation function of the vessel. ... Other

> courts of appeal, particularly the Third and Seventh Circuits, have rejected this view and require that before a plaintiff can sue under the Jones Act, he must be employed in such a way as to assist in the navigational function of a vessel.

International Oilfield Divers, Inc. v. Pickle, supra, (dissent - citations omitted).

This same distinction was also noted and discussed in the opinion of the Court below where it is made clear that the Fourth Circuit stands firmly with the Seventh and Third Circuits, and opposed to the Fifth Circuit, in its formulation of the Jones Act test of Seaman status, particularly in that portion of the test focussing on the job duties of the claimant. Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1485-6. (Petition, A-17, 18)

However, despite the clear differences among

the Circuits in the statement of the test, the facts of this case, as will be argued below, make it clear that there would have been no difference in result had the case been decided under the Fifth Circuit test, and the Circuits which follow it, or, as it was, under the Third and Seventh Circuit tests followed by the Fourth and other Circuits, and therefore, this case does not permit the issues to be adequately framed.

A brief summary of the tests in the Circuits to have considered the issue is helpful, and follows.

1. Circuits emphasizing aiding the general purpose of the vessel.

a. First Circuit:

The First Circuit has adopted the test formulated in Offshore Company v. Robison, 266 F.2d 769 (5th

Cir. 1959) without apparent alteration. See, Stafford v. Perini Corporation, 475 F.2d 507, 510 (1st Cir. 1973); accord, Bennett v. Perini Corporation, 510 F.2d 114 (1st Cir. 1975).

b. Fifth Circuit:

The test for Jones Act status in the Fifth Circuit as originally formulated in Offshore Company v. Robison, supra, has been recently reaffirmed in Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), and later in Lormand v. Superior Oil Co., 845 F.2d 536, 539 (5th Cir. 1987), cert. denied 484 U.S. 1031 (1988), wherein the test is set out as:

> A worker claiming seaman status must establish (1) that he is assigned permanently to a vessel in navigation or performs a substantial part of his work on a vessel or fleet of vessels and (2) that his work contributes to the function of the vessel or to the accomplishment of its mission.

(citations and footnote omitted)

c. Eighth Circuit:

The Eighth Circuit has adopted the Offshore v. Robison test. Slatton v. Martin K. Eby Construction Co., Inc., 506 F.2d 505, 510 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975); accord, Miller v. Patton-Tully Transportation Co., Inc., 851 F.2d 202, 204 (8th Cir. 1988).

d. Eleventh Circuit:

In Hurst v. Pilings & Structures, Inc., 896 F.2d 504, 505 (11th Cir. 1990) the Eleventh Circuit has adopted a variant of the Fifth Circuit test set out in Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447 (5th Cir. 1980).

2. Circuits with a "primarily in aid of navigation" or serving the "transportation function" of the vessel test.

a. Second Circuit:

The test in the Second Circuit is not as clear as in other Circuits, but it is placed under this heading due to the discussion in Klarman v. Santini, 503 F.2d 29, 33 (2nd Cir. 1974), concerning the "aid to navigation" test:

> ... requirements for a Jones Act seaman are that "the vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation". Harney v. William M. Moore Building Corporation, 359 F.2d 649, 654 (2nd Cir. 1966). While these requirements have not been interpreted strictly, they are not meaningless. ... Although "aid to navigation" has been read "very broadly", Harney, supra, 359 F.2d at 654, it is nevertheless required that an alleged seaman "perform services upon ships and [be] exposed to the unique hazards of work upon the sea". Mahramas v. American Export Isbrantsen Lines, Inc., 475 F.2d 165, 170 (2nd Cir. 1973).

See, also, McSweeney v. M.J. Rudolph Corp., 575 F.Supp. 746, 748 (E.D.N.Y. 1983).

b. Third Circuit:

The Third Circuit has a very strong "aid to navigation" test:

> This Court has previously held that among the "decisive elements necessary of proof in determining who is 'a member of a crew' within the meaning of the Jones Act" is a requirement "'that the worker be aboard [the ship] primarily to aid in navigation.'" Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 36 (3rd Cir. 1975), cert. denied, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976).

Simko v. C&C Marine Maintenance Co., 594 F.2d 960 (3rd Cir. 1979), cert. denied, 444 U.S. 833 (1979).

c. Fourth Circuit:

The Court below has stated the following as

being that portion of the test for the Fourth Circuit which focusses on the job duties of the claimant:

> The second prong of the test for determining seaman status under the Jones Act ... is whether a worker's duties, when considered in the aggregate, serve naturally and primarily as an aid to navigation. In making the "aid to navigation" determination, a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate.

Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1486 (Petition, A-18); accord, Stephenson v. McLean Contracting Co., Inc., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S.Ct. 2110 (1989).

d. Sixth Circuit:

Although the Sixth Circuit has clearly included a navigational function requirement, it apparently has received an expansive reading. In Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982), the test is stated:

> ... in determining whether a particular employee is a "seaman" the following test shall be applied; 1) is the vessel in navigation, 2) does the employee have a more or less permanent connection with the vessel, and 3) was the employee on board the vessel primarily in aid of navigation?

Accord, Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732 (6th Cir. 1986). See also, Brown v. McKinnon Bridge Co., Inc., 732 F.Supp. 1479 (E.D.Tenn.1989).

Since, however, the Sixth Circuit cases cite and rely upon cases from the Fourth, Fifth and Seventh circuits, and the Searcy case, supra, 679 F.2d at 616, finds no real distinction between its test and the Fifth Circuit's test in Offshore Company v. Robison, supra, it is hard to tell exactly where the Sixth Circuit lies on the issue, but its inclusion under this heading is made because of the express "primarily in aid of navigation" language.

e. Seventh Circuit:

The Seventh Circuit test was developed in Johnson v. John F. Beasley Construction Co., 742 F.2d 1054, 1063 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985) as stating that there is evidence of seaman status where at the time of the injury:

> (1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.

f. Ninth Circuit:

The Ninth Circuit has adopted a test including a navigational duty standard:

> Under the Jones Act, status as a "seaman" depends on three factors: (1) the vessel on which the claimant was employed must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be aboard primarily in aid in navigation.

Gizoni v. Southwest Marine, Inc., 909 F.2d 385, 387 (9th Cir. 1990), citing Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392, 393 (9th Cir. 1973).

3. There is no conflict in result in this case.

As noted earlier, the facts are extremely important in each Jones Act case. The factual recitation in the opinion below is lengthy as to each Petitioner, 907 F.2d 1482-3, (Petition, A-3-7) and it is unnecessary to set forth these facts again. The Circuit Court's summary of its conclusions, however, is helpful:

> Next, appellants claim that their duties, when considered as a whole, establish that they served as an aid to navigation in the broadest sense. They do not contend that their duties primarily contributed to the transportation function of the vessel. It is clear that Yoash and Casson were pile drivers whose primary purpose was to aid in the building of a bridge, not in the navigation of the vessel. Their duties, when considered in the aggregate, were not to "serve naturally and primarily as an aid to navigation"

> .... Those activities which did relate to the transportation function of the CAPE FEAR were offshoots of the pile driving work.

907 F.2d 1486-7 (citations omitted, Petition A-20).

Clearly, the result reached below would have been the same in each of the Circuits with an aid to navigation or transportation function of the vessel. See, eg:

Second: McSweeney v. M.J. Rudolph Corp., supra, 575 F.Supp. at 748.

Third: Simko v. C&C Marine Maintenance Co., supra, 594 F.2d at 965

Sixth: Brown v. McKinnon Bridge Co., Inc., supra, 732 F.Supp. at 1484.

Seventh: Johnson v. John F. Beasley Construction Co., supra, 742 F.2d at 1064.

Ninth: cf., Gizoni v. Southwest Marine, Inc., supra, 909 F.2d at 387 (factual analysis).

Merely because the petitioners cannot meet the aid to navigation or transportation function test, and thus are not seaman under the tests in six Circuits, is not to assume that they thereby satisfy the status tests in the remaining four Circuits to have adopted a test. To so assume ignores the fact that the Fifth Circuit test, adopted verbatim in the First, Eighth and Eleventh Circuits, has other elements, among which is the necessity for the claimant to be assigned to a "vessel". Offshore Company v. Robison, supra, 266 F.2d at 779.

What constitutes a "vessel" for Jones Act purposes under the Robison test has been the subject of a number of decisions, the principals culled from which recently have been set out in Daniel v. Ergon, Inc., 892 F.2d 403, 407 (5th Cir. 1990), as follows:

> In numerous cases we have been called upon to determine the existence of a vessel. From these cases we have discerned three factors -

> common to floating platforms that are not considered vessels:
> (1) The structures involved were constructed and used primarily as work platforms;
> (2) they were moored or otherwise secured at the time of the accident; and
> (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

Accord, Bernard v. Binning Construction Co., Inc., 741 F.2d 824 (5th Cir. 1984).

In applying this test, the Eleventh Circuit has held a barge identical in basic design and purpose to the crane barge in the present case, to be a work platform, and not a vessel for Jones Act purposes, as a matter of law. Hurst v. Pilings & Structures, supra, 896 F.2d at 506-7. Of significance to the Hurst decision was that the barge had no motive power of its own, and is towed by a tow boat when it needs to change location. The

barge was equipped with "spuds", which are legs which are lowered into the bed of the waterway to render it immobile. The barge was used as a work platform, with any transportation function being merely incidental to its primary purpose. The barge carried its own small boats and a crane to aid its function.

The barge involved in the present case appears to be identical. See Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1483 (Petition, A-5).

The Court in Hurst held that the claimant was not a Jones Act seaman because the floating platform to which he was assigned was not a "vessel" as a matter of law. See also, Daniel v.Ergon, Inc., supra; Bernard v. Binnings Construction Co., Inc., supra, Powers v. Bethlehem Steel Corp., 477 F.2d 643 (lst Cir. 1973), cert. denied, 414 U.S. 856 (1973).

Albeit under a different "prong" of the test, there is a very strong likelihood that the result reached by the Fourth Circuit in the present case would be the same under the test applied in the Fifth Circuit and the Circuits which have adopted its test.

4. A decision of this Court on the merits would not be Outcome Determinative.

Thus, the Court ought to exercise its discretion in denying the present Petition, since a review of the facts of this case shows that the outcome, in all likelihood, would have been no different had this case been decided under the test adopted by the Fifth Circuit and the courts of appeal following its lead. Therefore, this case does not present this Court with an opportunity to decide a matter of contest among the Circuits, but only, should the writ be granted, with a decision of an abstract issue,

albeit a fascinating and intellectually taxing one. This, of course, would run counter to the Court's own announced policy. See, eg, Rice v. Sioux City Cemetery, supra. The facts of this case simply do not create that tension between the various tests of seaman status which would highlight the differences and permit the proper common guiding principles to be perceived.

In Layne & Bowler Corporation v. Western Well Works, Inc., 361 U.S. 387 (1923), a patent infringement case, this Court had granted a petition for writ of certiorari in order to resolve an apparent conflict among the Circuits. Although the Court found in that case that the conflict was more apparent than real, and dismissed the writ accordingly, the language in Chief Justice Taft's opinion applies with some force in the present case, albeit the conflict here is real and not imagined, because there

would be no likely conflict in outcome in this case:

> ... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

261 U.S. at 393. See also Justice Frankfurter's dissent in McAllister v. United States, supra.

Because any decision of this Court is not likely to be outcome determinative, the existing conflict among the Circuits cannot be properly resolved.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari not be granted.

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